

AGUA CALIENTE BAND OF CAHUILLA INDIANS

TRIBAL HISTORIC PRESERVATION



December 17, 2015

Christopher Calfee, Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Re: OPR's proposed interpretation of Substantial Evidence Standard for Tribal Cultural Resources

Dear Mr. Calfee,

This letter is submitted on behalf of the Agua Caliente Band of Cahuilla Indians, a federally recognized Indian tribe. We write to express our concern regarding language in the discussion draft *OPR Draft Technical Advisory: AB 52 and Tribal Cultural Resources in CEQA* presently published on the OPR website.

We are submitting this letter pursuant to our government-to-government relationship with the State of California and the Governor's Office of Planning and Research concerning State advisories, regulations and other documents your office is issuing that affect tribal communities. We are concerned that the discussion draft Advisory, as written, will have serious adverse affects on tribal resources and self-governance. It is our understanding that the discussion draft Advisory is in draft form and that OPR is actively working on revisions. As such, we ask this correspondence be taken into meaningful consideration as part of the re-draft.

Our Tribe supported AB 52, authored by Assemblyman Gatto, because it ensured tribal governments and the vital resource information they possess concerning their sacred places and tribal cultural resources (TCRs) would be included within the CEQA process in a manner that is meaningful, subject to the same CEQA standards and policies as other resources, while acknowledging the sovereign status of Tribes, their unique cultural relationships to these resources and their expertise concerning identification of and information about those resources.

It is deeply troubling that the discussion draft Advisory OPR has offered fails to uphold these core principles and provisions in AB 52. Specifically, we oppose the language on page 5 stating, "... evidence of a fair argument of substantial evidence is insufficient by itself to compel a lead agency to treat something as a tribal cultural resource."

From a policy perspective, OPR's proposed interpretation of lead agency discretion in Section 21074(a) (2) of AB 52 will have detrimental effects on the core intentions and statutory language in AB 52. To put forth this interpretation will basically position tribal governments as rivals against the consultants of lead agencies and applicants. It will then allow the lead agency to choose the consultant's conclusion that something is NOT a TCR, even if the Tribe provides evidence of a fair argument that there is substantial evidence of a TCR, with the Tribe's only recourse being litigation. This is the same position Tribes were in prior to AB 52.

We supported AB 52 so that Tribes would now be able to utilize the same standards and provisions of CEQA, including a fair argument of substantial evidence. This standard of proof is the standard that is applied to other resources in CEQA. It should be the standard for Tribes and their information. California Tribes have already been displaced and removed from the lands to



which they have ongoing traditional ties. Tribes must not be forced to comply with a higher standard to ensure avoidance, mitigation and legal protections under CEQA.

In addition, the last thing Tribes wanted to create with AB 52 was an adversarial process pitting them against archaeologists and historians. As you may know, Tribes have a long and complex history with these academics and practitioners, but today we are more interested in working together than perpetuating old divides.

Most importantly, the Advisory is not even taking into consideration that Tribes are unlike CEQA consultants or EIR preparers. Tribes are sovereign nations. They have governing bodies. They represent communities and cultures that have had long-standing relationships with these resources for tens of thousands of years. These resources are unlike any historical or archaeological resource as they play a vital primary role in the identity and community value system of tribal nations. We believed this was recognized in AB 52 through the acknowledgement of tribal expertise and the creation of a new and separate resource category of TCRs. OPR's interpretation nullifies these core pieces of AB 52 and makes them seem as if they are pointless language.

From a legal perspective, we disagree with the legal support in the discussion draft. The cases cited in the discussion draft Advisory don't speak to tribal expertise or how it would be factored into a substantial evidence standard. OPR must exercise extreme caution to not accept the invitation of certain stakeholder groups to stretch cases beyond their specific facts and limited holdings or participate in veiled efforts to rewrite AB 52's legislative history after-the-fact.

First, the *Valley Advocates* case referenced on pages 5 and 12 of the Advisory represents the view of one district court. The Advisory completely failed to cite to *Architectural Heritage Association v. County of Monterey* (2004) 122 Cal.App.4th 1095, which has a contravening opinion that the fair argument *does apply* to the identification of historic buildings. Neither case, however, deals with TCRs. At best then, it can only be said there may be a split opinion in the district courts of whether a fair argument may be employed to identify historic buildings. This does little to help inform the implementation of AB 52: AB 52 specifically created a new class of resources called TCRs separate and apart from archaeological sites and historical buildings exactly because the policy, standards and practices of CEQA in those areas were *inappropriate for TCRs* and *failed to* adequately identify, consider or protect them.

Second, the *L Street* and *Berkeley Hillside Preservation* cases, summarily referenced in the Advisory on page 12, were decided and published *after* AB 52 was overwhelmingly approved by the state legislature. Again, neither case contributes to the implementation of AB 52 as neither case turned on a factual situation that is applicable to tribes or the new category of TCRs as legislated in AB 52: *L Street* dealt with an historic building and *Berkeley* dealt with exceptions to an exemption for a large new home which says little if anything about how to approach evidentiary standards for TCRs relative to negative declarations, mitigated negative declarations or environmental impact reports under AB 52.

We appreciate that OPR put the discussion draft Advisory out for public comment. This was a positive step. Presumably it did so to test if it was on the right track regarding this new area of the law. Accordingly, we ask that the paragraph on page 5 regarding *Berkeley Hills* be struck and that the Technical Advisory instead emphasize those parts of the bill and its legislative



intent related to tribal expertise and the new category of TCRs to help get the advisory back on track.

If alternative language is needed to replace the language we are seeking to strike we offer the following language as a replacement:

The statute also provides that lead agencies may have discretion in deciding whether a non-listed resource is a Tribal Cultural Resource. However, the statute also finds and declares that these resources are essential elements in tribal cultural traditions, heritages and identities and that California Native American Tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources. Such information and knowledge is to be appropriately factored into the existing definition of substantial evidence.

In addition, because of the serious nature of this issue and the impacts it will have on tribal communities, we are also requesting Government-to-Government consultation on the draft Advisory concerning this issue and our other issues of concern relative to CEQA and the CEQA Guidelines Update, many of which we have previously set forth to you in verbal correspondence.

Lastly, we want to make sure OPR understands we prefer alternative three with suggested edits below.

Alternative 3

TRIBAL CULTURAL RESOURCES.

Information submitted through consultation with a California Native American Tribe that has requested such consultation may is to be considered by assist a lead agency in determining what type of environmental document should be undertaken, identifying tribal cultural resources, determining whether the project may adversely affect tribal cultural resources, and if so, how such effects may be avoided or mitigated. Whether or not consultation has been requested, However, regardless of whether tribal consultation occurs or is completed, substantial adverse changes to a tribal cultural resource are to be identified, assessed and mitigated. Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.

Potentially No Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact
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1) Would the project cause a substantial adverse change in a site, feature, place, cultural landscape, sacred place, or object, with cultural value to a California Native American Tribe, which is any of the following:

a) Included or determined to be eligible for inclusion in the California Register of Historical Resources?

b) Included in a local register of historical resources?

c) Determined by the lead agency, in its discretion and supported by substantial evidence, to be a tribal cultural resource, after applying the criteria in Public Resources



Code §5024.1(c), and considering the
Significance of the resource to a California
Native American Tribe?

c) After considering the significance of
the resource to a California Native American
Tribe and applying the criteria in Public
Resources Code §5024.1(c), a resource
is determined by the lead agency, in its
discretion and supported by substantial
evidence, to be a tribal cultural resource?

2) Would the Project:

a) Potentially disturb any human remains,
including those interred outside of dedicated
cemeteries (see Cal. Public Resources Code, Ch. 1.75,
§5097.98 and Health and Safety Code §7050.5(b))?

b) Potentially disturb any resource or place defined in
Public Resources Code §5097.9 et seq
(Native American Historical, Cultural
and Sacred Sites)?

Thank you for your time and consideration of this crucial and important issue to tribal
sovereignty and self-determination.

Sincerely,

Patricia Garcia-Plotkin
Tribal Historic Preservation Officer
Agua Caliente Band of Cahuilla Indians

cc: Michael Martinez, Office of the Governor
Assemblyman Mike Gatto
Ken Alex, Director, Governor's Office of Planning and Research
John Laird, Secretary of Natural Resources
Cynthia Gomez, Executive Director, Native American Heritage Commission